

**Operational
Policy**Section
Re-employment in the Construction IndustrySubject
Re-employment Penalties and Payments - Construction Industry

Policy

When construction employers do not fulfill their re-employment obligations, the WSIB may

- levy a penalty on the employer up to the amount of the worker's net average earnings in the year prior to the injury, and
- make payments to the worker for up to one year as if the worker was entitled to payments for loss of earnings.

Penalties are not levied unless verbal and written notice of a re-employment breach has been provided to the employer and the employer has been given a reasonable opportunity to comply.

NOTE

This policy should be read in conjunction with 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements and 19-05-03, Compliance with the Re-employment Obligation—Construction Industry. Policy 19-05-02 also contains definitions for key terms that appear in this policy.

Purpose

The purpose of this policy is to set out the penalties that may be levied on a construction employer in the case of a re-employment obligation breach, and the payments and services that may be provided to the worker.

Guidelines

Education

The WSIB recognizes that a construction employer's ability to meet its re-employment responsibilities is largely based on the employer having a clear understanding of the circumstances which give rise to a re-employment obligation, and the steps the employer must take to fulfill its obligation.

Therefore, the WSIB informs and educates employers about

- their general roles and responsibilities in the work reintegration (WR) process
- the legal and policy provisions which set out an employer's obligation to re-employ
- how and when the legal and policy provisions apply in a particular case
- what the WSIB's role in re-employment is and how it can assist employers in complying with the re-employment obligation, and
- what the likely consequences are if the employer is found in breach of its obligation to re-employ.

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Warning employers

In those cases where the WSIB is considering making a finding that a breach of an employer's obligation to re-employ has occurred, the WSIB first warns the employer about this possibility. This communication should be done verbally, whenever possible, so that the WSIB and the employer can discuss

- what the employer's re-employment obligation requires it to do
- why the employer has not fulfilled its obligation
- the amount of the likely penalty that may be levied against the employer
- the period for which the worker will likely receive re-employment payments/loss of earnings (LOE) benefits, and
- the accident cost implications if re-employment payments/LOE benefits are issued to the worker.

The WSIB confirms the outcome of its discussion with the employer in writing. If verbal communication is not possible, the WSIB writes to the employer to

- warn it of the possibility of a finding that the employer has not fulfilled its re-employment obligation, and
- request that the employer contact the WSIB as soon as possible to discuss the situation.

Employer notice

Following a warning, if the WSIB determines that an employer has still not complied with its obligation to re-employ, the WSIB provides **verbal notice** whenever possible, and **written notice** in all cases. Every WSIB notice informs the employer

- of the finding that a re-employment breach has occurred
- of the re-employment penalty that will be levied on the employer on the **date the written notice comes into effect**, and
- what the employer is required to do to bring itself into compliance with the re-employment obligation.

The **date the written notice comes into effect** is seven WSIB business days after the date that appears on the written notice. (WSIB business days are Monday to Friday inclusive, excluding public and declared holidays.)

Applying a re-employment penalty

If a warning has been provided, and if the employer has still not complied with its re-employment obligation on the date the written notice comes into effect, the WSIB proceeds to levy a re-employment penalty against the employer.

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A re-employment penalty is an amount owing to the WSIB at the time it is levied.

Amount of the penalty

Generally, the WSIB levies a re-employment penalty against the employer based on the worker's actual net average earnings (NAE) for the year before the injury. This amount is not subject to the ceiling used in the calculation of LOE benefits.

The penalty is applied from the date the written notice to the employer comes into effect, i.e., seven WSIB business days after the date that appears on the written notice.

Example

The WSIB determines that a construction employer has failed to re-employ a construction worker whose NAE is \$80,000.00. Following a warning, and subsequent discussion, the WSIB provides the employer written notice of the re-employment breach by letter dated May 7th. Although the worker's NAE is greater than the maximum earnings ceiling for 2009, the WSIB levies an \$80,000.00 penalty on the employer. The \$80,000.00 penalty is an amount owed to the WSIB effective May 16th, i.e., seven WSIB business days after the date on the written notice which was provided to the employer.

NOTES

1. If an employer fails to meet the re-employment obligation on more than one occasion for the same claim, the total of all penalties levied cannot exceed the maximum penalty, i.e., the worker's actual NAE for the year before the injury.
2. Depending on the circumstances, the WSIB may levy different penalties throughout the duration of the re-employment obligation. For more information on the duration of the re-employment obligation, see 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements.

Apportioning the penalty

If a re-employment breach occurs more than 30 days after the start date of the re-employment obligation, the amount of the penalty is apportioned to reflect the length of the remaining re-employment obligation period.

Example

The employer breaches its obligation to re-employ six months after receiving notice that the worker is medically able to perform the essential duties of his pre-injury employment. The re-employment obligation ends 12 months after the worker became fit for the essential duties of his pre-injury employment. If the worker's NAE for the year before the injury is \$60,000.00, but only 6 months of the re-employment obligation remains, the penalty is apportioned as follows:
NAE (\$60,000.00) ÷ total number of months in re-employment obligation (12) = monthly penalty (\$5000.00) x 6 (months remaining in re-employment obligation) = (\$30,000.00) applicable penalty.

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Waiving the penalty

The WSIB may waive the penalty in its entirety if the employer offers to re-employ the worker, but the worker and the employer agree to a voluntary termination.

However, if an employer fails to offer to re-employ a worker, and the worker agrees to sever the employment relationship (with or without a severance package), the penalty may still be levied.

Reducing the penalty

The WSIB may reduce the amount of the penalty if the employer

- subsequently meets the re-employment obligation
- offers work that is not appropriate given the worker's medical ability to return to work, or
- offers work at a workplace that is not appropriate in view of the applicable re-employment obligation.

Subsequently meets the re-employment obligation

The reduced penalty is calculated according to the number of weeks (or part weeks) that the employer does not meet the re-employment obligation. The formula is:

Number of weeks (up to 52) x worker's weekly NAE = penalty

Example

The WSIB notifies the employer, who is bound by a collective agreement in respect of the worker, that the worker is medically able to perform the essential duties of his pre-injury employment. Subsequently, the WSIB determines that the employer has failed to offer to re-employ the worker in a position in the worker's trade and classification at a collective agreement workplace, although such a position was available. Accordingly, the WSIB levies a penalty equal to the worker's NAE for the year before the injury (\$52,000.00 or \$1000.00 per week).

52 weeks x \$1,000.00 NAE = \$52,000.00 penalty

The employer re-employs the worker ten weeks after the date of the written notice. The WSIB reduces the penalty to the number of weeks that the employer failed to re-employ the worker, calculated from the date of the written notice, and adjusts the employer's account.

10 weeks x \$1,000.00 NAE = \$10,000.00 penalty

Inappropriate offer of work

An employer may be in breach of its obligation to re-employ when it

- makes an offer of work that is not consistent with the worker's medical ability to return to work, e.g., an employer offers suitable construction or non-construction work to a worker who is fit for the essential duties of his or her pre-injury employment, or

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- offers work at a workplace that is not appropriate, e.g., a non-union employer offers work in the worker's trade at a comparable workplace when work in the worker's trade at the pre-injury workplace was available.

In cases where the employer has breached its obligation to re-employ by making an inappropriate offer of work, the penalty may be reduced by

- 75% if the employer offers work at no wage loss, or
- 50% if the employer offers work at a wage loss.

Failure to accommodate

In all cases the employer must accommodate the work to the needs of the worker, to the extent that the accommodation does not cause the employer undue hardship. In addition, where the employer controls the workplace, the employer's duty to accommodate to the extent of undue hardship applies to both the work and the workplace. For more information on the duty to accommodate to the extent of undue hardship, see 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements.

If the WSIB determines that an employer has not complied with its duty to accommodate, and if, as a result, the worker was unable to return to work, or returned to inappropriate work, the WSIB proceeds to levy a re-employment penalty in the same manner as if the employer had breached its obligation to offer work. A penalty reduction may apply to a failure to

accommodate in the same way as it applies to a failure to offer appropriate work (see "Reducing the penalty," above).

Retroactive application of re-employment penalty

In the event that the WSIB is informed of a re-employment breach more than 30 days after it has occurred, the WSIB may levy a re-employment penalty and/or make re-employment payments on a retroactive basis. A retroactive penalty is applied without warning or prior notice and is effective from the date the employer failed to offer available work. However, the retroactive application of a penalty/payment will not generally occur unless the WSIB is satisfied that the employer

- was aware of its re-employment obligation in the specific claim in issue
- had no valid reason for failing to fulfill its re-employment obligation, and
- failed to fulfill its re-employment obligation.

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Employer's duty to co-operate in WR

In deciding to levy a re-employment penalty, the WSIB decision-maker may also determine whether a finding of non-co-operation is appropriate. However, in cases where an employer breaches both a re-employment and a co-operation obligation in the same claim, the WSIB cannot levy both penalties, and must choose which penalty is most likely to lead to a positive return to work outcome for the worker.

Collection of penalty

The WSIB collects re-employment penalties according to its regular collection rules. For more information, see 14-04-05, Alternative Payment Arrangements, 14-04-04, Collections Based on Financial Hardship, and 14-04-03, Writs of Seizure and Sale.

Objection to penalty

A re-employment penalty is not suspended if an employer launches an objection to the decision giving rise to the penalty. In these cases, the penalty is still levied and collection activities are pursued. If the penalty is overturned, the WSIB refunds the penalty amount, with interest, see 14-03-10, Statement of Account.

Authorizing re-employment payments or LOE benefits

Re-employment payments—worker fit for essential duties without accommodation

Calculating payments—no offer of work

If a worker is medically able to perform the essential duties of the pre-injury employment without accommodation, but the employer fails to re-employ, the WSIB issues re-employment payments to the worker, including interest, effective from the date the re-employment obligation was breached.

NOTE

For the purpose of determining when a re-employment payment starts, the "date of breach" is seven WSIB business days after the date that appears on the WSIB's written notice of breach. Thus, a worker's re-employment payments generally start on the same date that a re-employment penalty is applied to the employer.

Re-employment payments are equal to LOE benefits, i.e., 85% of a worker's pre-injury NAE.

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Re-employment payments are issued for up to

- one year, or
- the end of the re-employment obligation, whichever comes first,

as long as the worker is available for, and co-operates in, a work transition (WT) assessment and/or appropriate WR activities. For more information on the duration of the re-employment obligation, including start and end dates, see 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements.

If the worker declines to participate in the WT assessment, or does not co-operate in appropriate WR activities, the WSIB may reduce or suspend the re-employment payments. In the event the worker demonstrates renewed co-operation, or decides to participate in a WT assessment, re-employment payments may be reactivated.

Calculating payments—inappropriate offer of work at a wage loss

If an employer is in breach of the re-employment obligation but offers the worker suitable construction or non-construction work at a wage loss, the WSIB issues partial re-employment payments based on the difference between the worker's pre-injury NAE and the NAE of the suitable work offered by the employer.

The WSIB may provide the worker with appropriate WR services for **up to** one year from date the re-employment obligation was breached. If the worker accepts this option, he or she receives full re-employment payments while participating in the WR activities.

Calculating payments—inappropriate offer of work at no wage loss

If an employer is in breach of the re-employment obligation but offers the worker suitable construction or non-construction work at no wage loss, no re-employment payments are generally issued.

The WSIB may provide the worker with appropriate WR services for **up to** one year from the date the re-employment obligation was breached. If the worker accepts this option, he or she receives full re-employment payments while participating in the WR activities.

Employer subsequently meets obligation or worker obtains other employment

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Re-employment payments and the appropriate WR services generally end if the employer subsequently meets the re-employment obligation, or if the worker obtains employment in the general labour market at earnings that meet or exceed his or her pre-injury earnings.

LOE Benefits—worker only fit for accommodated or suitable work**Calculating payments—no offer of work**

If a worker is medically able to perform the essential duties of the pre-injury job only with accommodation or only able to perform suitable work, and the employer fails to re-employ, the WSIB pays LOE benefits to the worker including interest, effective from the date the re-employment obligation was breached.

NOTE

For the purpose of determining when an LOE benefit starts, the “date of breach” is seven WSIB business days after the date that appears on the WSIB’s written notice of breach. Thus, a worker’s LOE benefits generally start on the same date that a re-employment penalty is applied to the employer.

In these circumstances the WSIB

- conducts a WT assessment, and
- determines whether the worker requires a WT plan or appropriate WR services.

If the employer fails to offer any work, full LOE benefits are paid as long as the worker is available for, and co-operates in

- health care measures, and
- WR activities, or
- a WT assessment and, if required, a WT plan

no matter whether the assessment, plan or services extends beyond the date the re-employment obligation comes to an end.

If the WSIB determines that the worker does not require a WT plan, or if the worker’s WT plan has concluded, the WSIB may provide the worker with appropriate WR services for **up to** one year from the date the re-employment obligation was breached. In this case the WSIB converts the LOE benefits to re-employment payments.

If the worker is not available for, or does not co-operate in, health care measures or a WSIB sponsored plan or program, the WSIB may reduce or suspend the LOE benefits or the re-employment payments, as the case may be. In the event the worker demonstrates renewed co-operation, the LOE benefits or the re-employment payments may be reactivated.

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If an employer is in breach of the re-employment obligation but offers the worker suitable construction or non-construction work at a wage loss, the WSIB pays partial LOE benefits based on the difference between the worker's pre-injury NAE and the NAE of the suitable work offered by the employer, see 18-03-02, Payment and Reviewing LOE Benefits (Prior to Final Review).

If, based on the results of the WT assessment, the WSIB determines that the worker requires a WT plan, the worker receives full LOE benefits while participating in the plan.

If the WSIB determines that the worker does not require a WT plan, the WSIB may provide the worker with appropriate WR services for **up to** one year from the date the re-employment obligation was breached. In this case the WSIB converts the LOE benefits to re-employment payments.

Calculating payments—inappropriate offer of work at no wage loss

If an employer is in breach of the re-employment obligation but offers the worker suitable construction or non-construction work at no wage loss, no LOE benefits are generally issued.

If the WSIB determines that the worker does not require a WT plan, the WSIB may provide the worker with appropriate WR services for **up to** one year from the date the re-employment obligation was breached. If the worker accepts this option, he or she receives full re-employment payments while participating in the WR activities. If the worker declines to participate in the appropriate WR activities, no further action is taken.

Improvement in worker's ability to return to work

If the worker's medical ability to perform work improves such that he or she is fit for the essential duties of the pre-injury job without accommodation, and if this improvement occurs at any time prior to the date the re-employment obligation comes to an end, the WSIB converts the LOE benefits to re-employment payments.

NOTE

LOE benefits are not limited to one year in duration. However, if the WSIB converts a worker's LOE benefits to re-employment payments, those payments are only issued for **up to** one year from the date the re-employment obligation was breached.

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The WSIB re-examines the need for a WT plan or appropriate WR services, see 19-03-05, Work Transition Plans, if the employer subsequently meets the re-employment obligation, or if the worker obtains employment in the general labour market at earnings that meet or exceed his or her pre-injury earnings.

Appeal time limit

A worker or employer has 30 days to indicate to the WSIB his or her intention to object to a re-employment decision. For more information on objecting to a WSIB decision, see the document Appeals System Practice & Procedures.

Application date

This policy applies to all decisions made on or after February 15, 2013 for all injuries on or after September 1, 2008.

Document history

This document replaces 19-05-04 dated September 18, 2008.

References**Legislative authority**

Workplace Safety and Insurance Act, 1997, as amended

Sections 41(13)(14), 43, 55

O. Reg. 35/08

Minute

Administrative

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